

MEMORANDUM

DATE: May 1, 2008

TO: Ms. Sheryl A. Paquette
Division of Human Relations

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: 11 DE Reg. 1357 [HRC Equal Accommodations & Fair Housing Regulations]

The State Council for Persons with Disabilities (SCPD) has reviewed the Human Relations Commission's (HRC) proposal to amend its regulations covering the processing of complaints under both the Equal Accommodations and Fair Housing statutes (Title 6 Del.C. Chapters 45 and 46). The regulations were published as 11 DE Reg. 1357 in the April 1, 2008 issue of the Register of Regulations. SCPD has the following observations and recommendations.

EQUAL ACCOMMODATIONS REGULATIONS

First, in the "Introduction" section, first sentence, delete "under".

Second, in the "Introduction" section, last sentence, the HRC recites that the revised regulations will apply to causes of action arising under the Equal Accommodation Act after May 8, 2008. Section 11.3 explicitly applies the APA to any amendment to the existing regulations. Under the APA, non-emergency regulations cannot become final until "10 days from the date the order adopting, amending or repealing a regulation has been published in its final form, in full or as a summary, in the Register of Regulations..." See Title 29 Del.C. §10118(g). With a public hearing scheduled for May 8, the earliest final regulations could be published in the Register is June 1, 2008. If the HRC is confident of publication of the final regulation in the June Register, it could consider adoption of an effective date of approximately June 11.

Third, a period should be inserted at the end of §1.2, definition of "minor".

Fourth, the HRC should consider deletion of the definition of "Persons Entitled to Protection" in §1.2. SCPD could not locate any reference to the term in the regulations and the definition is therefore superfluous. Moreover, the definition is oddly worded. It essentially states that all persons in Delaware are protected. Finally, the term "handicap" should be deleted to comport with the deletion of "handicap" in §1.1 based on Title 6 Del.C. §4502(6).

Fifth §2.6.3 is "underinclusive". It refers to "owner, lessee, proprietor, manager or superintendent". The statute [Title 6 Del.C. §4504(a)(b)] now includes the following: director, supervisor, agent or

employee.

Sixth, §2.8 recites that service of the complaint shall be made in accordance with “12.2 of these Regulations”. There is no §12.2 in the Regulations.

Seventh, in §4.3, substitute “attorney” for “attorneys”.

Eighth, in §5.1.8, first sentence, substitute “to” for “on” after “due”.

Ninth, §5.1.10 is “underinclusive”. It only refers to a right of appeal of an order dismissing a complaint by “the Panel” while §5.0 includes circumstances under which dismissal can be authorized by “a single Commissioner” (§5.1.2) or Panel Chair or designee (§5.1.6). The HRC could consider amending §5.1.10 as follows: “Any final order dismissing a complaint under this section is subject to Superior Court review pursuant to 6 Del.C. §4511.”

Tenth, in §7.1, third sentence, retain the word “conciliation” rather than substituting “fact-finding”. My rationale is as follows:

A. The title of Regulation 7.0 is “Conciliation”.

B. Conciliation is different from fact-finding. Compare the HRC’s Fair Housing regulations. A “fact-finding” conference is part of investigation (§4.3) which is distinct from “conciliation” (§5.0).

C. The Equal Accommodations statute refers to “conciliation” (§4507) and includes a helpful definition of “conciliation [§4502(4)]. There is no definition of “fact-finding”.

D. The conference under §7.0 may involve no “fact-finding” whatsoever (e.g. facts may be undisputed) and settlement terms could be the sole topic of discussion.

Eleventh, §8.5 changes the time period to request a subpoena from 10 calendar days to 20 business days prior to hearing. This is a long time. It would be less objectionable if there were a regulation establishing a long notice of hearing timeframe (e.g. minimum of 60 days). Otherwise, if a party were provided 30 calendar days notice of hearing, there would be no time to request a subpoena. A compromise would be 15 business days. Since §11.0 converts periods of less than 11 days to “business days”, the current 10 calendar day standard is essentially 10 business days. A 15 business day standard would amount to an extension of 5 business days in the regulation.

Twelfth, §8.6 authorizes “another person who is not a Party” to serve a subpoena. This conflicts with Title 6 Del.C. §4510(a), first sentence.

Thirteenth, SCPD recommends adopting the same time frame for disclosure of witnesses and exhibits under §§8.8 and 8.10. As a practical matter, this will generally result in a single combined submission rather than two submissions. Moreover, the interests served by the advance disclosure are the same. Council recommends amending §8.8 by establishing a 10 business day standard to conform to the 10 business day standard in §8.10. This would be the same timetable adopted in the

HRC's Fair Housing regulations, §§10.1 and 10.2.

Fourteenth, §8.9 categorically precludes consideration of any motion not delivered 10 business days prior to hearing. This is too rigid. Literally, a party could not even file a motion for a continuance based on good cause 9 business days prior to hearing. In all other contexts, the Commission reserves discretion in addressing late submissions. See §§8.2 and 8.5 and 8.10.1. The no-exceptions approach also creates a conflict with §11.1.2.

Fifteenth, the HRC Fair Housing regulation (§10.1.1) authorizes a panel to inspect or view the location involved in the case. This could be particularly helpful in an accessibility dispute. The HRC may wish to amend §8.10 to incorporate such an authorization in the Equal Accommodation standards.

Sixteenth, in §9.3, first sentence, some words are missing. Insert "any Party" after "order".

FAIR HOUSING REGULATIONS

Seventeenth, in §1.0, move "Special Administration Fund" to appear after "Respondent" to match Title 6 Del.C. §4602.

Eighteenth, although the concept of "direct threat" usually appears in the context of a tenancy [Title 6 Del.C. §4603(c)], it could arise in some other housing contexts as well. Consider substituting "occupancy" for "tenancy" at the end of §1.0, definition of "direct threat". By analogy, the "reasonable accommodation" definition is not limited to "tenancy".

Nineteenth, §10.3 categorically precludes consideration of any motion not delivered 10 business days prior to hearing. This is too rigid. Literally, a party could not even file a motion for a continuance based on good cause 9 business days prior to hearing. The no-exceptions approach creates a conflict with §14.1.2.

Twentieth, §11.5 requires a request for subpoena to be submitted at least 20 business days prior to hearing. This is a long time. It would be less objectionable if there were a regulation establishing a long notice of hearing timeframe (e.g. minimum of 60 days). Otherwise, if a party were provided 30 calendar days notice of hearing, there would be no time to request a subpoena. A compromise would be 15 business days.

Twenty-first, the period is missing at the end of §14.1.2.

Twenty-second, §15.0 appears to address only 2 of the 3 means of qualifying as "housing for older persons" in Title 6 Del.C. §4202(16). The HRC may wish to consider whether §15.0 should be amended to address Title 6 Del.C. §4602(16)a.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations and recommendations on the proposed regulations.

cc: Ms. Juana Fuentes-Bowles
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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